UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED SITE SERVICES OF CALIFORNIA Case Nos. 20-CA-139280
20-CA-149509

and

TEAMSTERS LOCAL 315, IBT

CHARGING PARTY'S REPLY BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION

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INTRODUCTION

In its June 16, 2017, cross-exceptions, Charging Party Teamsters Local 315 ("the Union") raised a number of objections to the Administrative Law Judge's supplemental decision in this matter. Respondent United Site Services of California has opposed each of those cross-exceptions. In this brief, the Union addresses just one of the issues raised in its cross-exceptions: the Union's request that the Board overturn *Hot Shoppes*[1] and place the burden on an employer hiring permanent replacements to prove that the hiring of *permanent* replacements is necessary to keep the employer's business in operation during a strike. Otherwise, the Union relies on the points raised in its opening brief in support of the remaining cross-exceptions.

Respondent in its opposition raised four points in urging the Board to reject the Union's request to overturn *Hot Shoppes*. We address each of those points below.

ARGUMENT

A. *American Baptist Homes* Does Not Moot the Union's Request

Respondent argues that the Board's recent decision in *American Baptist Homes*, 364 NLRB No. 13 (May 31, 2016), represents the current Board's rejection of the Union's argument here, that *Hot Shoppes* should be overturned. While the Board did apply *Hot Shoppes* in *American Baptist Homes*, Respondent's argument nonetheless is misplaced. Rather, the Board expressly noted that the question of the continued viability of *Hot Shoppes* was not raised in *American Baptist Homes*. *Id*. at n.6 and n.10. Referring to *Belknap v. Hale*, 463 U.S. 491 (1983), the Board majority remarked:

> Citing *Hot Shoppes*, the Court pointed out that the Board does not require an employer to show that it was necessary to use permanent replacements in order to keep the business operating. That aspect of *Hot Shoppes* – the proper interpretation of *Mackay* – is not before us.

[1] 146 NLRB 804 (1964).

Id. at n.10. Per the Union's and the General Counsel's cross-exceptions in this case, it is now.

B. Hiring Permanent Replacements Is Inherently Destructive of Section 7 Rights

Respondent appears to concede that the hiring of permanent replacements *is* inherently destructive of employee Section 7 rights, but argues that it is not *so* destructive of Section 7 rights as to warrant placing a burden on the employer to justify its decision to hire permanent replacements. Of course, under *Great Dane Trailers*, 388 U.S. 26 (1967), and *Fleetwood Trailer*, 389 U.S. 375 (1967), whenever employer conduct is inherently destructive of Section 7 rights, the employer faces the burden of showing its conduct was motivated by legitimate, non-discriminatory reasons. To suggest that an employer's hiring of replacement employees and then refusing to permit striking employees to return to work at the end of strike, until and unless a vacancy occurs, is *not* inherently destructive of the employees' protected right to strike simply ignores reality.

The crux of Respondent's argument here is that the Supreme Court and the Board have recognized that an employer's hiring of permanent replacements is in and of itself the legitimate justification for hiring permanent replacements and denying striking employees their jobs upon conclusion of a strike. This of course begs the question of why the employer hired the permanent replacements in the first place. And this tautological reasoning – that the inherently destructive conduct is inherently legitimate – is exactly what is wrong with *Hot Shoppes* and why the Board should now overturn that mistaken decision.

And while Congress may have sanctioned "economic warfare" between employers and unions, contrary to Respondent's suggestion, Congress has not sanctioned any particular economic weapons and certainly has not specifically sanctioned the use of permanent replacements. *Cf*. *American Baptist Homes*, *supra*, slip op. at 39. More to the point, the issue here is not whether an employer may used permanent replacements, but

under what conditions may it do so. And the Supreme Court in *Belknap v. Hale*, while noting the legitimacy of an employer's use of permanent replacements, expressly avoided addressing the question of the conditions under which an employer may utilize permanent replacements. 463 US at 504, n.8.

C. Permanent Replacements Are Not an Economic Weapon Enshrined in the Act

While it is true that Court and Board precedent permits employers to use the hiring of permanent replacements as an economic weapon, it does not follow that the Act precludes the Board from requiring employers to prove the necessity of hiring permanent replacements to keep its operations underway in order to justify the conduct. Respondent's argument that the Board lacks "statutory authority" to adopt such a rule represents a gross misreading of the Act. Likewise, Respondent's argument that the Act "expressly protects" an employer's right to hire permanent replacements is ludicrous. Of course Respondent is unable to cite what portion of the Act supposedly contains this "express" protection. But more fundamentally, the Board has always applied the Act in ways that limit the parties' use of economic weapons. Unions, for example, are barred from using "partial" or "intermittent" strikes. And more to the point, employers are barred from using permanent replacements to deny reinstatement to unfair-labor-practice strikers. It is thus clear the Board has the authority under the Act to limit an employer's use of economic weapons, including the use of permanent replacements.

D. There Is Nothing Impractical or Unworkable About a Test Requiring Employers to Justify the Hiring of Permanent Replacements

Respondent raises a host of hypothetical proof problems in arguing that a test that requires employers to prove a legitimate business justification for the hiring of *permanent* replacements would be unworkable in application. This argument, of course, ignores the many circumstances under which parties subject to the Act must plan their conduct to comply with the Act and under which the Board must then assess the facts to determine whether a party's conduct has or has not violated the Act. Case-by-case application of

the Act is one of the hallmarks of the Board's procedures. This is not to say that the Board has not on occasion adopted "bright line" rules. But the existence of these "bright line" rules hardly diminishes the Board's authority to apply the law on a case-by-case basis nor the utility of case-by-case application in appropriate situations such as this.

For example, the Board routinely handles discharge cases on a case-by-case basis; application of the *Wright-Line* defense, when raised by an employer necessitates this. In these circumstances the Board must, and does, assess whether an employer's proffered defense is "legitimate" and non-discriminatory. And in this process, the Board by necessity examines a myriad of factors. That there is some uncertainty in the application of the Board's *Wright-Line* test on a case-by-case basis does not render the Board's legal standard unworkable. Nor would it here, should the Board, as the Union urges, reverse *Hot Shoppes* and impose an obligation on employers to justify the hiring of permanent, as opposed to temporary, replacements.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our prior brief, the Charging Party respectfully requests that our cross-exceptions be granted in their entirety.

Dated: July 21, 2017

BEESON, TAYER & BODINE, APC

By: */s/Andrew H. Baker*
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NATIONAL LABOR RELATIONS BOARD

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is 483 Ninth Street, 2nd Floor, Oakland, CA 94607-4051. On this day, I served the foregoing Document(s):

CHARGING PARTY'S REPLY BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION

☒ **By Electronic Service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☒ **By Mail** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Beeson, Tayer & Bodine, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business in a United States mailbox in the City of Oakland, California.

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I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, on this date, July 21, 2017.

/s/ Esther Aviva
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